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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

AIRMAN FIRST CLASS GREGORY S. MOSES,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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March 2005

QUESTION PRESENTED

Whether petitioner's conviction for violating Article 125, UCMJ, for engaging in consensual sodomy with a child under the age of 16 years must be set aside in light of this Court's holding in *Lawrence v. Texas*, 539 U.S. 558 (2003), because petitioner was denied due process of law when the military judge informed him his mistake of fact as to the child's age was not a valid defense.

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Petitioner, Airman First Class Gregory S. Moses, respectfully prays that a Writ of Certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on December 21, 2004.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Moses*, USCA Dkt. No. 04-0241/AF, is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals (No. ACM S30336, November 12, 2003) is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on December 21, 2004.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution states that "No person shall . . . be deprived of life, liberty, or property, without due process of law."

Article 125, Uniform Code of Military Justice (UCMJ), Section 925 of Title 10, United States Code [hereinafter Article 125], provides:

(a) Any person subject to this chapter who engages in

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[1] Appendix A, p. 1a.

> unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

Article 125 includes the following basic element and two sentence-enhancing elements:

> (b) Elements.
>
> (1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.
>
> (Note: Add either or both of the following elements, if applicable)
>
> (2) That the act was done with a child under the age of 16.
>
> (3) That the act was done by force and without the consent of the other person.

The maximum confinement for a violation of Article 125 in cases not involving force or a minor is 5 years. In cases involving a child who, at the time of the offense, has attained the age of 12 but is under the age of 16, the maximum confinement is 20 years.

Article 120, Uniform Code of Military Justice (UCMJ) Section 920(d)(1) of Title 10, United States Code [hereinafter Article 120], provides:

> (b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person –

(1) who is not his or her spouse; and

(2) who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court-martial may direct.

(d)(1) In a prosecution under subsection (b) [carnal knowledge], it is an affirmative defense that –

(A) the person with whom the accused committed the act of sexual intercourse had at the time of the alleged offense attained the age of twelve years; and

(B) the accused reasonably believed that the person had at the time of the alleged offense attained the age of 16 years.

The maximum confinement for a violation of Article 120 in cases involving a child who has not attained the age of twelve years is confinement for life without the eligibility of parole. In cases involving a child who, at the time of the offense, has attained the age of 12 years, the maximum confinement is 20 years.

Article 134 (Indecent acts with a child), Uniform Code of Military Justice (UCMJ), Section 934 of Title 10, United States Code [hereinafter Article 134], includes the following elements:

(a) That the accused committed a certain act upon or with the body of a certain person;

(b) That the person was under 16 years of age and not the spouse of the accused;

(c) That the act of the accused was indecent;

(d) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and

(e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

The maximum confinement for a violation of Article 134 in cases involving a child under the age of 16 is 7 years. For a violation of Article 134, indecent acts with another, the maximum confinement is 5 years.

STATEMENT OF THE CASE

On January 23, 2003, petitioner was tried by a special court-martial composed of a military judge sitting alone at Cannon Air Force Base, New Mexico. Petitioner pled guilty to one specification alleging that he had engaged in consensual sodomy with a child under the age of 16 years in violation of Article 125, UCMJ.[2]

During the plea inquiry, the military judge instructed petitioner as follows:

"Sodomy" is unnatural carnal copulation. Unnatural carnal copulation occurs when a person takes into his or her mouth or anus the reproductive sexual organ of another person, or places his penis into the mouth or anus of another, penetrates the female sex organ with

[2] Petitioner was also charged with and pled not guilty to committing an indecent act upon the body of a female under 16 years of age under Article 134, UCMJ. The charge and its specification were withdrawn after arraignment because of a pretrial agreement.

> his or her mouth, lips, or tongue, or places his sexual reproductive organ into any opening of the body, except the sexual reproductive parts of another person. Penetration of the mouth or anus however slight is required to establish this offense. An ejaculation is not required. Neither force nor lack of consent is required for this offense. Stated conversely, *neither lack of force nor consent are defenses. It is also no defense that you were ignorant or misinformed as to the true age of the child or that the child was of unchaste character.* It is the fact of the child's age and not your knowledge or belief that fixes criminal responsibility. Do you understand the elements and definitions as I have read them to you? (R. 16) (emphasis added).

Petitioner then admitted that he met C.D.C., a 14-year-old female, sometime in September or October 2002. (R. 17). On one occasion when C.D.C. came to visit petitioner in his dormitory room on Cannon Air Force Base, she voluntarily performed oral sodomy on petitioner by placing his penis into her mouth. (R. 19; Pros. Ex. 1). Petitioner explained to the military judge that he did not know how old C.D.C. was when the sodomy occurred, but he later found out she was 14 years of age. (R. 20).

After the military judge accepted petitioner's plea and entered a finding of guilty, petitioner elected to make an unsworn statement in order to present matters in mitigation and extenuation to the military judge. The unsworn statement was conducted in a question and answer format with petitioner's trial defense counsel conducting the questioning. (R. 55). During petitioner's unsworn statement, the following exchange regarding C.D.C.'s age occurred:

> Q: When you had conversations with [K.S.], who is Airman White's friend, and [C.D.C.], what are the

general nature of those conversations?

A: Just stuff she did, you know, at school, the friends she didn't like, what her friends said today, stuff like that.

Q: And what did you know about – or believe about her age?

A: Airman White had told me that [K.S.] was 16 about to turn 17.

Q: That is [K.S.]?

A: That is [K.S.]. And I had thought that since I had heard that they were in the same – in high school together, that they were the same age.

....

Q: At any point did you become concerned about what her real age was?

A: Later on.

Q: And why was that?

A: After I had seen her for the last time, she was calling a whole bunch of times a night, maybe three or four times a night. And, you know, the stuff that she was talking about was just seeming more and more – less mature I should say. So, I had my suspicions.

Q: Before that happened, had you talk[ed] to anybody about whether you should continue your relationship with [C.D.C.]?

A: Airman Dyke[.]

Q: And what was that conversation about?

A: We were just talking about how I was seeing a girl and pretty much the conversation went back and forth. And you know I told him that it was a master sergeant's daughter, a dependent, and that she was 16, that I was wondering if I should take the relationship to the next step.

....

Q: When you got back from leave, did you have a conversation with Airman White about [C.D.C.]?

A: Not until after he went and saw the OSI.

Q: Okay. About the age, that's what I'm getting at, I'm sorry, I should have made it clear. Did you have a conversation with him about how old [C.D.C.] was?

A: Yes. After he went and saw OSI, he found out that she was fourteen and he informed me, and the next day I went to OSI.

Q: Was that the first time you ever heard that she was 14 years old?

A: That was the first time I heard it.

(R. 56-60).

After receiving the remainder of the evidence presented in the sentencing phase of the court-martial, the military judge sentenced petitioner to be discharged from the Air

Force with a bad-conduct discharge, to be confined for one month and to perform hard labor without confinement for three months. (R. 80).

On appeal of his conviction to the Air Force Court of Criminal Appeals, petitioner submitted his case on its merits. On November 12, 2003, the Air Force Court affirmed the findings and the sentence. *United States v. Moses*, ACM S30336 (A.F. Ct. Crim. App. 12 November 2003) (App. D, p. 4a). On May 12, 2004, the United States Court of Appeals for the Armed Forces granted review of the following issue raised for the first time on appeal:

> WHETHER APPELLANT'S PLEA OF GUILTY TO VIOLATING ARTICLE 125, UCMJ, BY ENGAGING IN CONSENSUAL SODOMY WITH SOMEONE HE BELIEVED WAS 16 AT THE TIME OF THE OFFENSE (CHARGE I AND ITS SPECIFICATION) MUST BE RENDERED IMPROVIDENT IN LIGHT OF THE UNITED STATES SUPREME COURT'S HOLDING IN LAWRENCE V. TEXAS, 123 S.CT. 2472 (2003).

(App. C, p. 3a). The court, citing its previous decision in *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), summarily affirmed the petitioner's conviction on December 21, 2004. (App. A, p. 1a).

On 10 January 2005, petitioner requested reconsideration of the decision of the Court of Appeals for the Armed Forces. Specifically, petitioner requested that the court address whether the mistake of fact defense applies in sodomy cases involving minors and, if so, whether petitioner raised the defense during his trial. On February 4, 2005, the Court of Appeals denied the petition for reconsideration. (App. B, p. 2a).

REASONS FOR GRANTING THE WRIT

This case asks whether there is any rational basis for denying the affirmative defense of mistake of fact to a military member who engages in consensual sodomy with a person he reasonably believes to be 16 years of age. Under military law, the affirmative defense of a mistake of fact as to age is available to military members who are accused of having sexual intercourse with or digitally penetrating a minor that the accused believes to be at least 16 years of age. But this legal defense is not available for anyone who engages in consensual sodomy with that same minor.

Consequently, there are two questions of fundamental importance to the administration of justice in the United States Armed Forces that should be answered. First, can the United States continue to prosecute and punish military members for engaging in private, consensual sodomy with another person in light of this Court's recent decision in *Lawrence v. Texas*, 539 U.S. 558 (2003)?

Second, if the answer to the first question is "yes", then under a due process analysis, should petitioner have had the right to assert a mistake-of-fact defense as to age of the person with whom petitioner is alleged to have had sodomy, just as he would have had for an allegation of carnal knowledge with a child under the age of 16 years under Article 120 and indecent acts with a child under the age of 16 years under Article 134? *See United States v. Strode*, 43 M.J. 29 (C.A.A.F. 1995) (holding that the accused should have been able to assert a mistake-of-fact defense for indecent acts with a minor).

This Court has recognized that the Due Process Clause of the Fifth Amendment has an equal protection component, which is a concept that stems from the American ideal of

fairness. *Bolling v. Sharpe*, 347 U.S. 497 (1954). In the end, there is no rational basis for allowing one military accused to assert a mistake-of-fact defense as to the minor's age when he has sexual intercourse with or digitally penetrates the minor, while denying another accused that same legal defense because the sexual act was consensual sodomy. Such issues are of fundamental importance to those who serve in the armed forces and this Court should review this matter.

Petitioner's conviction should be set aside in light of this Court's holding in Lawrence v. Texas, 539 U.S. 558 (2003) because petitioner was denied due process of the law under the Fifth Amendment.

Although petitioner pled guilty to the offense, his plea was not provident because it was not voluntary and intelligent. This Court has long held that a guilty plea is not voluntary if an accused "has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976). "[A] plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Bousley v. United States*, 523 U.S. 614, 618 (1998) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). Such notice is all the more critical when a decision of this Court places conduct "beyond the power of the criminal law-making authority to proscribe" and there is "a significant risk that a defendant stands convicted of an act that the law does not make criminal." *Bousley*, 523 U.S. at 620 (citations omitted).

Under Article 125, a military member who is convicted of private, consensual oral sodomy with a child over the age

of 12 but under the age of 16 faces a potential maximum punishment that includes up to 20 years imprisonment and a dishonorable discharge. *MCM*, Part IV, ¶ 51(e)(2). The 20-year period of confinement represents a 15-year increase over the maximum confinement time for the offense of sodomy with a person who has attained the age of 16 years.

By its express terms, Article 125 prohibits all oral and anal sex, heterosexual or homosexual, even between husband and wife, whether accomplished by force or with consent. *See United States v. Scoby*, 5 M.J. 160 (C.M.A. 1978). Additionally, Article 125 "does not distinguish between an act committed in the privacy of one's home, with no person present other than the sexual partner, and the same act committed in a public place in front of a group of strangers, who fully apprehend the nature of the act." *Id.* at 163.

The specification of Charge I in petitioner's case alleged the following violation of Article 125, UCMJ:

> In that AIRMAN FIRST CLASS GREGORY SCOTT MOSES, United States Air Force, 27th Logistics Readiness Squadron, Cannon Air Force Base, New Mexico, did, at or near Cannon Air Force Base, between on or about 1 September 2002 and on or about 31 October 2002 commit sodomy with [C.D.C.] a child under the age of 16 years.

Here, a conviction under Article 125 requires proof of two elements: that the accused engaged in unnatural carnal copulation and that the act was done with a child under the age of 16. *See Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 51(b)(1) and (2). The Manual for Courts-Martial offers the following definition of unnatural carnal copulation:

> It is unnatural carnal copulation for a person to take

> into that person's mouth or anus the sexual organ of another person ... or to place that person's sexual organ in the mouth or anus of another person ...

MCM, Part IV, ¶ 51(c) (2002 ed.).

In *Lawrence v. Texas*, 539 U.S. 558 (2003), this Court struck down a Texas statue that made criminal the act of sodomy between members of the same sex. In overruling its previous decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), this Court held that the petitioners' right to liberty under the Due Process Clause gives them the full right to engage in private sexual conduct, to include sodomy, without government intervention. *Lawrence*, 539 U.S. at 578.

This Court also recognized a distinction between private, consensual sodomy between adults and those cases involving minors, force, coercion, public conduct, or prostitution. *Id.* at 578. Under such circumstances, it is presumed, the right to such a liberty under the Due Process Clause could be curtailed.

The Court of Appeals for the Armed Forces recently addressed the application of *Lawrence* in the military context in *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). In resolving the question of how *Lawrence* impacts Article 125, the Court of Appeals settled on an analysis that consists of the following three questions:

> First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court?
>
> Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in Lawrence?

> Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the Lawrence liberty interest?

Marcum, 60 M.J. at 206-07 (internal citations omitted).

The Court of Appeals further elaborated on the second question of the analysis, addressing factors identified by this Court as not involved in *Lawrence*. Specifically, the Court of Appeals indicated that the second question concerned conduct that involved minors, public conduct or prostitution, or persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. *Id.* at 207.

In this case, petitioner was charged with sodomy with C.D.C, a child under the age of 16 years. The only factor that could take the instant case outside the liberty interest identified in *Lawrence*—and therefore within one of the exceptions set out by *Marcum*—is the fact that C.D.C. was a child under the age of 16 years at the time of the offense. But, as petitioner told the military judge, he honestly believed that C.D.C was 16 years old at the time of the sodomy.

Based on this belief and the facts to which petitioner admitted during the plea inquiry, if petitioner had sexual intercourse with C.D.C. and had been charged with carnal knowledge under Article 120, he would have had available to him a mistake-of-fact defense. Similarly, if petitioner had digitally penetrated C.D.C. and been charged with indecent acts with a minor under Article 134, a mistake-of-fact defense would have been available as well. *See, e.g., United States v. Strode*, 43 M.J. 29 (C.A.A.F. 1995). But because petitioner and C.D.C. engaged in oral sodomy, according to the current state of the law, petitioner has no such defense, even though if C.D.C's age were as petitioner believed, petitioner would have been engaging in constitutionally

protected behavior. This raises the counter-intuitive situation where, if petitioner had decided to have sexual intercourse with or digitally penetrate C.D.C., he would have had an affirmative defense available to him. Yet because he engaged in oral sodomy he faced a maximum punishment of 20 years in confinement.

Previously, the justification for treating sodomy, carnal knowledge, and indecent acts with a minor differently in terms of the availability of a mistake-of-fact defense as to age was that sodomy was a "strict liability" offense, ostensibly because it was immoral. *See Strode*, 43 M.J. at 31. In light of this Court's decision in *Lawrence*, however, such a standard is no longer defensible. If the alleged victim's status as a minor is the only factor taking sodomy outside the liberty interest articulated by this Court, as is the case here, there should be no distinction between how the government treats sodomy, carnal knowledge, and indecent acts with a minor. Consequently, petitioner was denied due process because he was deprived of the affirmative defense of a reasonable mistake of fact as to the age of his consensual partner.

This Court has recognized that the unique character of the military may justify different applications of certain constitutional protections. *Parker v. Levy*, 417 U.S. 733 (1974). When one examines the disparity in the applicable law, even scrutinized under a rational basis analysis, however, certain provisions simply do not pass muster.

Article 120, carnal knowledge, permits a mistake-of-fact defense as to age. Accordingly, a military member may have sexual intercourse with a child he reasonably believes to be 16 years of age without criminal consequence. On the other hand, that same military member cannot engage in sodomy—even oral to genital—and receive the same due process protections. Interestingly, a mistake-of-fact defense is

available for Article 125 sodomy offenses when sodomy is committed by force and without consent. *See United States v. Gamble*, 27 M.J. 298 (C.M.A. 1988); *U.S. v. Strode*, 43 MJ. 29 (C.A.A.F. 1995).

The mistake-of-fact defense in carnal knowledge cases was specifically permitted by Congress. Prior to a 1996 amendment to the Manual for Courts-Martial, military courts applied the Federal rule that it is "no defense that the accused is ignorant or misinformed as to the true age of the female[.]" Manual for Courts-Martial, United States (1995 ed.), Part IV, Para. 45c(2). Prior to the amendment, military courts had consistently held that the mistake-of-fact defense did not apply to either carnal knowledge or indecent acts leading up to carnal knowledge with a child under the age of 16. *U.S. v. Strode*, 43 MJ. 29, 32 (C.A.A.F. 1995). In fact, military courts declined to apply the affirmative defense even while the proposed change to Article 120 was pending (*U.S. v. Schuler*, 47 M.J. 561 (NMCCA 1997)) or in the instance where an appeal continued following approval of the amendment. (*U.S. v. Schuler*, 50 M.J. 254 (C.A.A.F. 1999)).

The 1996 amendment created an affirmative defense, commonly called "reasonable mistake as to the age of the victim." Pub. L. No. 104-106, Sec. 1113, 110 Stat. 462 (enacted Feb. 10, 1996). This defense therefore was appropriately raised if the alleged victim was at least 12 years old and there is evidence that the accused reasonably believed he or she was at least 16 years old.

Military courts have also taken affirmative steps to establish a mistake-of-fact defense in the absence of a federal statute. In *U.S. v. Strode*, the Court of Appeals for the Armed Forces established a mistake-of-fact defense to the offense of indecent acts with a minor under Article 134. The court based its reasoning on the distinction between indecent acts upon a child under 16 that lead up to offenses such as carnal

knowledge, and those that do not. Specifically, the court stated that the mistake-of-fact defense is permissible for indecent acts when the conduct *does not lead up to* an offense for which the mistake-of-fact defense is not available, i.e. carnal knowledge and sodomy. 43 M.J. at 32 (emphasis added). The Court held that "[m]istake of fact is available to a military accused who is charged with committing indecent acts with a child under the age of 16 if he had an honest and reasonable belief as to the age of the person *and* if the acts would otherwise be lawful were the prosecutrix age 16 or older." *Id.* at 33. In essence, the lower court judicially created an affirmative defense that was not otherwise provided for under Article 134 for indecent acts.

Under this reasoning, petitioner argues that such a judicial interpretation should also apply here as well. His conduct with the alleged victim was private, consensual, and—but for the age of the child—consistent with the protected liberty interest established in *Lawrence*. As such, a mistake-of-fact defense should be permitted.

The Court of Appeals declined to address the issue of the mistake-of-fact defense in this case. This avoidance is particularly disappointing when one examines its rationale in *Strode*. In distinguishing between indecent acts and carnal knowledge, the Court noted that the mistake-of-fact defense was available for indecent acts precisely because the age of the alleged victim *enhanced* the maximum possible punishment for indecent acts, unlike carnal knowledge which did not. However, since the 1996 amendment to Article 120, carnal knowledge also has a sentence enhancement based upon the age of the alleged victim. Further, Article 125 includes a sentence enhancing provision for sodomy with a child under the age of 16. Using this rationale, offenses under Article 125 should be permitted the same affirmative defense as that provided for both carnal knowledge and indecent acts with a minor.

As the law stands, no consideration is afforded a military member's honest and reasonable belief that an alleged sodomy victim is 16 years of age or older. Conversely, in prosecutions under Article 120 or Article 134, such an honest and reasonable belief, if proven, absolves military members of any criminal liability. And as the Navy-Marine Court of Criminal Appeals has noted, "an honest and mistaken belief as to a female's age can negate criminality with respect to carnal knowledge, yet if the same accused and the same female were to engage in sodomy during the same tryst, the accused could be sentenced to 20 years of confinement. ... as absurd the result, that is the law. We must apply it." *United States v. Sirk*, NMCCA 200301084, unpub. op. September 27, 2004 at p.2. (Appendix E, p. 8a).

Petitioner respectfully submits that it is this very inconsistency that necessitates a correction by this Court. Article 125 already permits a mistake-of-fact defense for forcible sodomy. *See United States v. Gamble*, 27 M.J. 298 (C.M.A. 1988). Because sodomy with a minor under Article 125 should no longer be viewed as a "strict liability" offense—especially as it relates to offenses such as carnal knowledge and indecent acts with a minor—there is no rational basis for allowing a mistake-of-fact defense as to one sentence-enhancing element (force) and not another (age).

This Court has held that the right to present a defense is fundamental. The right gives an accused the opportunity "to offer the testimony of witnesses, and to compel their attendance. . . [which] is in plain terms the right to present a defense, the right to present the defendant's version of the facts ... to the jury." *Webb v. Texas*, 409 U.S. 95, 98 (1972). Furthermore, an essential component of procedural fairness is an opportunity to be heard. That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence. *Crane v. Kentucky*, 476 U.S. 683, 690

(1986). "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 U.S. 358, 364 (1970).

In this case, petitioner believed that C.D.C. was at least 16 years of age at the time they engaged in sodomy. The current state of the law, however, is such that a mistake-of-fact defense does not apply to Article 125 as it does to Article 120 and Article 134. The only difference between carnal knowledge, indecent acts with a minor, and sodomy with a minor is the type of sexual act. If petitioner had engaged in sexual intercourse or committed an indecent act, the military judge would have rejected his plea based on his mistake-of-fact defense. There is no rational basis for denying a mistake-of-fact defense for one offense—consensual sodomy—while permitting it for the others. Because such a result violates petitioner's constitutional right to equal protection and due process, this Court should grant review of this important issue.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant his petition for a Writ of Certiorari.

Respectfully submitted,

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March 2005

Appendix A

UNITED STATES, Appellee

v.

Gregory S. MOSES, Airman First Class
U.S. Air Force, Appellant

No. 04-0241

Crim. App. No. S30336

United States Court of Appeals for the Armed Forces

Decided December 21, 2004

ORDER:

On further consideration of the granted issue (60 M.J. 44) in light of *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004) it is by the Court, this 21st day of December, 2004,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is affirmed.

Appendix B

UNITED STATES, Appellee

v.

Gregory S. MOSES, Airman First Class
U.S. Air Force, Appellant

No. 04-0241

Crim. App. No. S30336

United States Court of Appeals for the Armed Forces

Decided February 4, 2005

ORDER:

On consideration of Appellant's motion to submit petition for reconsideration out of time and petition for reconsideration[1] of this Court's order dated December 21, 2004, it is, by the Court, this 4th day of February, 2005,

ORDERED:

That said motion to submit petition for reconsideration out of time is hereby granted; and

That said petition for reconsideration is hereby denied.

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[1] Appellant petitioned for reconsideration, asking the court to address whether the mistake-of-fact defense applies in alleged sodomy cases, such as Appellant's, where the accused mistakenly believes the alleged victim is at least sixteen (16) years of age and, if so, whether this defense was raised by Appellant during his providency inquiry.

Appendix C

UNITED STATES, Appellee

v.

Gregory S. MOSES, Airman First Class
U.S. Air Force, Appellant

No. 04-0241

Crim. App. No. S30336

United States Court of Appeals for the Armed Forces

Order Granting Review May 12, 2004

On consideration of the petition for grant of review of the decision of the Unites States Air Force Court of Criminal Appeals, it is, by the Court, this 12th day of May, 2004,

ORDERED:

That said Petition is hereby granted on the following issue:

WHETHER APPELLANT'S PLEA OF GUILTY TO VIOLATIONS OF ARTICLE 125, UCMJ, BY ENGAGING IN CONSENSUAL SODOMY WITH SOMEONE HE BELIEVED WAS 16 AT THE TIME OF THE OFFENSE (CHARGE I AND ITS SPECIFICATION) MUST BE RENDERED IMPROVIDENT IN LIGHT OF THE UNITED STATES SURPREME COURT'S HOLDING IN LAWRENCE V. TEXAS, 123 S.Ct. 2472 (2003).

No briefs will be filed under Rule 25.

Appendix D

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class GREGORY S. MOSES
United States Air Force

ACM S30336

12 November 2003

Sentence adjudged 23 January 2003 by SPCM convened at Cannon Air Force Base, New Mexico. Military Judge: Kurt D. Schuman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 1 month, and hard labor without confinement for 3 months.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Sandra K. Whittington.

Appellate Counsel for the United States: Colonel LeEllen Coacher.

Before

PRATT, ORR, W.E., and GENT
Appellate Military Judges

PER CURIAM:

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. §866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELICIA M. BUTLER, TSgt, USAF
Chief Court Administrator

Appendix E

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

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UNITED STATES

v.

Staff Sergeant MICHAEL T. SIRK
United States Marine Corps

NMCCA 200301084

September 27, 2004, Decided

Sentence adjudged 4 April 2002. Military Judge: M.H. Sitler. Review pursuant to *Article 66(c), UCMJ*, of General Court-Martial convened by Commanding General, 2d Marine Division, Camp Lejeune, NC.

DISPOSITION: Affirmed.

COUNSEL: LT COLIN KISOR, JAGC, USNR, Appellate Defense Counsel.

Capt GLEN HINES, USMC, Appellate Government Counsel.

JUDGES: BEFORE: Charles Wm. DORMAN, W.L. RITTER, M.J. SUSZAN.

OPINION BY: CHARLES WILLIAM DORMAN

OPINION: DORMAN, Chief Judge:

Pursuant to his pleas, the appellant was convicted by general court-martial of the following offenses: consensual sodomy, indecent acts, and indecent language -- all with the same 14-year-old female, and fraternization with the females' Marine boyfriend. The appellant's crimes violated Articles 92, 125, and 134, Uniform Code of Military Justice, *10 U.S.C. § § 892*, *925*, and *934*. The military judge sentenced the appellant to confinement for 48 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence and, except for the bad-conduct discharge, ordered the sentence executed.

The appellant has raised three assignments of error in his appeal before this court. He asserts that the military judge erred in advising that the appellant's mistaken belief as to the female's age was not a defense to sodomy, that the approved sentence is inappropriately severe, and that he has been denied a timely review of his conviction.

We have carefully considered the record of trial, the appellant's three assignments of error, and the Government's response. We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *Arts. 59(a)* and *66(c), UCMJ.*

Mistake of Fact

At trial the parties stipulated that the appellant did not know the real age of the female, and that she had told the appellant that she was 17 years old. In advising the appellant of the elements of sodomy, the military judge also informed the appellant: "It is no defense that you were ignorant or misinformed as to the true age of the child. It is the fact of the child's age and not your knowledge or belief that fixes criminal responsibility." Record at 33. The appellant argues that this advice was legally incorrect in light of *Lawrence v.*

Texas, 539 U.S. 558, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003).

The appellant also argues that, since mistake of fact as to the "victim's" age in carnal knowledge is an affirmative defense, an absurd result obtains when considering the maximum punishments that may be imposed for the two different crimes of carnal knowledge and sodomy. An honest and mistaken belief as to a female's age can negate criminality with respect to carnal knowledge, yet if the same accused and the same female were to engage in sodomy during the same tryst, the accused could be sentenced to 20 years of confinement. *See Art 120(d), UCMJ*, and MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, P 51.e(2). As reasonable and well-crafted as is the appellant's argument, and as absurd the result, that is the law. We must apply it. *See United States v. Nelson, 53 M.J. 319, 323 (C.A.A.F. 2000)*(noting that it is up to the legislative branch rather than the judicial branch of government to change the law in the area of public policy.)

We are also guided by decisions of our superior court, which we must also follow. In *United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004)*, the constitutionality of *Article 125* was upheld. Applying *Marcum* to the facts of the case before us, there is no constitutional issue concerning the appellant's conviction for sodomy. Additionally, in *United States v. Strode, 43 M.J. 29 (C.A.A.F. 1995)* the court noted that the defense of mistake of fact concerning the victim's age "is not . . . available to . . . sodomy." *Id. at 31*. In our view however, an honest and reasonable belief as to the victim's age "may serve as a mitigating circumstance under the sentencing rules." *Id. at 32*.

Sentence Appropriateness

In determining the appropriateness of a sentence we are to afford the appellant individualized consideration under the law. Specifically, we must review the appropriateness of the

sentence based upon the "nature and seriousness of the offense and the character of the offender." *United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)*(quoting *United States v. Mamaluy, 10 C.M.A. 102, 27 C.M.R. 176, 180-81 (C.M.A. 1959))*. Without question this requires a balancing of the offense against the character of the offender. We have conducted that balancing in this case. We are cognizant of the appellant's honorable and lengthy service, as reflected by the evidence presented during the sentencing phase of his court-martial -- to include four separate awards of the Good-Conduct Medal, and noteworthy fitness reports. We are also cognizant of the criminal activities he engaged in, activities which were not only morally repugnant, but in which he also used his position as a Marine Staff Noncommissioned Officer to commit. Balancing all these factors, we conclude that the approved sentence is appropriate for this offender in light of his very serious offenses.

Speedy Review

In his third assignment of error, the appellant seeks relief based solely upon the length of time from the date of trial until review is completed before this court. Assuming the appellant is accurate with his count in days of delay as of 31 March 2004, as of 31 August 2004 it has been 890 days since the appellant's court-martial. Under the facts of this case, we decline to grant relief based upon this length of delay. We have been presented with no evidence that the appellant requested the convening authority to take a speedier action. Additionally, the appellant has made no attempt to demonstrate any prejudice as a result of this delay. *See generally United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002)*. Furthermore, where we have thoroughly reviewed the appellant's conviction while he is still confined, and having found no errors materially prejudicial to his substantial rights, to grant relief on delay alone would be granting a windfall.

Conclusion

The findings and sentence as approved by the convening authority are affirmed.

Senior Judge RITTER and Judge SUSZAN concur.